No. 591

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1951

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,
Petitioners,

v.

S. S. W., INC., *Respondent,*

and

AIR TRANSPORT ASSOCIATES, INC.,
GOLDEN NORTH AIRWAYS, INC.,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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This is a conditional cross-petition for writ of certiorari filed in connection with the petition of S. S. W., Inc., and intervenors Air Transport Associates, Inc., and Golden North Airways, Inc., in *S. S. W., Inc.* v. *Air Transport Association of America, et al.*, No. 568, filed this Term. Cross-petitioners are certain of the defendants in the suit in the lower courts. The defendants in that suit will be referred to herein as the defendants and S. S. W., Inc., the plaintiff below, as the plaintiff. The cross-petitioners are American Airlines,

Inc., Colonial Airlines, Inc., Capital Airlines, Inc., Northwest Airlines, Inc., Transcontinental & Western Air, Inc. (now Trans World Airlines, Inc.), United Air Lines, Inc., Air Transport Association of America, and Air Traffic Conference of America.

This petition seeks a writ only in the event that the petition in No. 568 is granted and relies on the record therein.

OPINIONS BELOW

The opinion of the District Court of the District of Columbia (R. 66-70) is reported at 91 F. Supp. 269. The opinion of the Court of Appeals (R. 79-86) is reported at 191 F. 2d 658. The plaintiff filed a complaint in the District Court charging the defendants with a conspiracy in restraint of trade in violation of the Sherman Act. The District Court sustained defendants' motions to dismiss the complaint on the ground that the Civil Aeronautics Board has primary jurisdiction over the subject matter of the suit by virtue of the Civil Aeronautics Act of 1938 and that necessary preliminary resort to the Civil Aeronautics Board by the plaintiff was not alleged in the complaint. (R. 70-71). The Court of Appeals likewise concluded that the Civil Aeronautics Board had primary jurisdiction over the subject matter of the suit (R. 83) but directed the District Court to stay the proceeding rather than dismiss it, and to retain jurisdiction of the suit pending action by plaintiff before the Civil Aeronautics Board. A motion by plaintiff for rehearing was denied by the Court of Appeals. (R. 95).

JURISDICTION

The order denying rehearing was entered October 5, 1951. (R. 95). On January 3, 1952, the Chief Justice

extended the time within which to file a cross-petition for certiorari until February 17, 1952. (R. 118). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (Supp. 1951).

QUESTION PRESENTED

Whether, after the District Court and the Court of Appeals have determined that the subject matter of a complaint under the anti-trust laws filed by one air carrier against other air carriers is within the primary jurisdiction of the Civil Aeronautics Board, where the complaint does not allege that the necessary preliminary determinations have been sought by the plaintiff or made by the Civil Aeronautics Board, and where defendants moved to dismiss the complaint at the outset of the suit, the complaint should have been dismissed, as ordered by the District Court, instead of the suit's being merely stayed pending an application by the plaintiff to the Civil Aeronautics Board.

STATUTES INVOLVED

In addition to provisions of the Sherman and Clayton Acts referred to at page 3 of the petition in No. 568, this matter involves the entire Civil Aeronautics Act of 1938,[1] particularly the detailed provisions of Title IV and Title X thereof which provide comprehensive regulation of the competitive practices, services and economics of the air transportation industry under the administration of the Civil Aeronautics Board. However, there is no statutory provision dealing explicitly with the question presented herein.

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[1] 52 Stat. 973-1030 (1938), as amended, 49 U. S. C. §§ 401-681 (1946).

STATEMENT

Plaintiff and defendants are all air carriers and are subject to the direct and comprehensive regulation of the Civil Aeronautics Board.[1] The Civil Aeronautics Act, under which the Board functions, applies to air carriers legal standards quite different from those applicable to business generally. The amount and kind of competition and the business and competitive practices in the air transportation industry are subject to most detailed regulation and restraint. Included in the Act is a requirement that inter-carrier agreements affecting rates, competition, etc., be filed with the Board for its approval or disapproval. 49 U.S.C. § 492. It is provided that when an agreement is approved the anti-trust laws shall not be applicable thereto. 49 U.S.C. § 494.

The complaint in this case charged that the defendants and other air carriers had agreed and conspired together to injure the plaintiff air carrier through cut rates and otherwise, in violation of the Sherman Act, and prayed for an injunction and treble damages. The defendants promptly moved to dismiss as stated above.

REASONS FOR GRANTING THE WRIT

The decision below is plainly correct in recognizing the Civil Aeronautics Board's primary jurisdiction over the matters covered in the complaint and in insisting that the plaintiff resort, in the first instance, to

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[1] The defendant Air Transport Association is an unincorporated trade association whose membership is composed wholly of the air carrier defendants and other air carriers similarly subject to the Civil Aeronautics Board's regulation. The defendant Air Traffic Conference actually is only a division and a part of the foregoing Association.

the Board's process. This view is required by *United States Navigation Co., Inc.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), and numerous other cases.

However, in deciding that the complaint should not be dismissed but instead should be stayed pending an application by the plaintiff to the Board, the Court of Appeals erred. Its decision in this respect is contrary both to the *Cunard* case and to *Armour & Co.* v. *Alton R. R.*, 111 F. 2d 913 (7th Cir. 1940), *aff'd*, 312 U.S. 195 (1941). In each of these cases where, under similar circumstances, primary jurisdiction was found to be in an administrative agency it was held that the complaint should be dismissed. Where the question of administrative jurisdiction does not appear, or is not raised, until the proceeding is in course a stay may be appropriate. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940). But where, as here, it is raised at the outset by motion to dismiss, dismissal is the proper action. The Court of Appeals for the Seventh Circuit has explained the matter thus:

> "In the El Dorado Terminal case the primary jurisdiction point was not raised until after the trial on the merits.
>
> "In the instant case the primary jurisdiction point was urged in limine. Therefore, the reasons for staying the dismissal do not exist, and it cannot be said on the strength of the El Dorado Terminal case that the Trial Court erred in failing to hold this case pending administrative reference and adjudication. We conclude, therefore, that the circumstances here do not require an application of the stay rule as announced recently in the El Dorado Terminal case." 111 F. 2d at 919.

The petition in No. 568 seeks review of the primary jurisdiction question. If that petition is granted, this Court should have the whole case before it, *cf. Langnes v. Green,* 282 U.S. 531, 535-539 (1931), and be in a position to deal with the only question on which the two courts below disagreed and to correct the conflict between the decision of the Court of Appeals herein and the *Cunard* and *Armour* cases. Otherwise an important question of procedure would be left in confusion.

CONCLUSION

If, but only if, the petition in No. 568 is granted, your petitioners pray that a writ of certiorari be directed to the United States Court of Appeals for the District of Columbia Circuit in order that this Court may review the question presented herein.

Respectfully submitted,

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Dated FEBRUARY 17, 1952.